

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JERRY L SULLIVAN,

No C-08-1837 VRW (PR)

Petitioner,

v

ORDER GRANTING PETITION FOR
WRIT OF HABEAS CORPUS

ROBERT L AYERS, Warden,

Respondent.

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Petitioner Jerry L Sullivan, a state prisoner incarcerated at San Quentin State Prison in San Quentin, California, seeks a writ of habeas corpus under 28 USC § 2254 challenging the California Board of Parole Hearings' ("BPH") July 30, 2007 decision to deny him parole at his twelfth parole suitability hearing. Doc #1.

On October 21, 2009 the court granted petitioner habeas relief based on his challenge to BPH's July 21, 2006 decision to deny him parole at his eleventh parole suitability hearing. See Sullivan v Ayers, No C-07-4963 VRW (PR) (ND Cal filed Sept 26, 2007), Doc #12; see Doc #20 (amended order filed Nov 4, 2009). The thirty-three page order included a comprehensive discussion of

1 petitioner's commitment offense and other factors relevant under
2 California law in determining his parole suitability upon which BPH
3 relied to deny him parole. Initially, the court observed:

4 At the time he was denied parole in 2006, fifty-
5 three-year-old petitioner had served twenty-
6 three years on his seven-to-life sentence - over
7 thirteen years past his minimum eligible parole
8 date - during which he had exhibited, in the
9 words of BPH, "pretty close to * * *
10 exceptional" institutional behavior, Doc #9-2 at
11 95; Doc #9-3 at 4; see also Doc #9-2 at 100
12 (petitioner's "institutional adjustment[] [has]
13 been exceptional"; petitioner's disciplinary
14 record has been "outstanding"; id at 56-57
15 (during the hearing BPH "commend[ed]
16 [petitioner]" for his "remarkable and
17 outstanding record" throughout the duration of
18 his life term). After recognizing petitioner's
19 "unblemished disciplinary profile," his
20 "positive programming" and "excellent rapport
21 with both inmates and staff," the July 2006
22 "Life Prisoner Evaluation Report" concluded:

23 Based on the absence of a prior criminal
24 history (taking into account his commitment
25 offense), his prison adjustment, the
26 findings in his psychiatric reports, and
27 his family support I believe [petitioner]
28 will re-integrate into society without
incident. I did not note any information
that would indicate he would not be able to
function as a law-abiding citizen should he
be allowed parole at this time.

Doc #9-5 at 49. And, the doctor who prepared
the psychological report specifically for
petitioner's parole suitability hearing
concluded: "[g]iven [petitioner's] history,
institutional adjustment, and present clinical
presentation there are no psychological factors
that would suggest an increased risk for violent
behavior, in either the community, or a
controlled setting at the present time." Doc
#9-3 at 31.

Doc #20 at 1-2. The court proceeded with a thorough analysis, and
ultimately concluded:

1 After careful review of the record and pertinent
2 law, the court finds there simply is no evidence
3 that petitioner was not suitable for parole and
4 would pose an unreasonable risk of danger to
5 society or a threat to public safety if released
6 from prison. The state court's determination
7 that BPH's reliance on the commitment offense as
8 well as what it termed petitioner's "uncertain
9 parole plans" satisfied the "some evidence"
10 standard was an objectively unreasonable
11 application of [Superintendent v Hill, 472 US
12 445, 457 (1985)]. See 28 USC § 2254(d). As a
13 result, petitioner is entitled to federal habeas
14 relief on his due process claim.

15 Id at 32-33.

16 The court then ordered respondent to calculate a term for
17 petitioner and set an imminent date for his release in accordance
18 with California Penal Code § 3041(a) and, within ten days of
19 petitioner's release, to file a notice with the court confirming the
20 date on which petitioner was released. Doc #20 at 33. Respondent
21 promptly filed in the Ninth Circuit a notice of appeal and a motion
22 to stay the proceedings pending appeal, which that court granted.¹
23 Doc ## 13 & 14 & 19. See Sullivan v Ayers, No 09-17403 (9th Cir,
24 filed Oct 28, 2009).

25 In the instant petition, petitioner challenges BPH's July
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27 ¹ On November 2, 2009, BPH conducted petitioner's thirteenth
28 parole suitability hearing and issued a "proposed decision" granting
him parole. See Sullivan v Ayers, No C-07-4963 VRW (PR) (ND Cal filed
Sept 26, 2007), Doc #23 at 1 & 5. That decision, however, is not yet
final. See Cal Pen Code § 3041(b) ("any decision of the parole panel
finding an inmate suitable for parole shall become final within 120
days of the date of the hearing" during which time BPH may review the
decision). Further, under California Penal Code § 3041.1, the
governor may request review of BPH's decision to grant parole "up to
90 days prior to a scheduled release date." It is unclear from the
November 2, 2009 "proposed decision" whether or not petitioner has a
scheduled release date.

1 July 30, 2007 decision finding him unsuitable for parole on the
2 ground that it does not comport with due process. Specifically,
3 petitioner argues that BPH's decision was "arbitrary" and
4 "capricious" because the record did not contain any evidence that he
5 presently posed a danger to society. Sullivan v Ayers No C-08-1837
6 VRW (PR) (ND Cal filed Apr 7, 2008), Doc #1 at 13-14. In deciding
7 to deny petitioner parole, BPH again relied on the commitment
8 offense, as well as petitioner's "inability" to express himself,
9 which led BPH to "feel[] that maybe there's an [American with
10 Disabilities Act] issue here that we're not picking up that's some
11 kind of block on processing * * * information." Id, Doc #6-2 at 18.

12 The instant petition raises substantially similar issues
13 presented to the court by petitioner in his challenge to his 2006
14 denial of parole. In granting petitioner relief in that action, the
15 court could have, and indeed perhaps should have, included a
16 discussion of the instant petition challenging petitioner's 2007
17 parole denial and decided both petitions simultaneously. Because an
18 appeal regarding the court's grant of habeas relief on that petition
19 is pending, the court now lacks jurisdiction to amend the order
20 granting relief to include a discussion of petitioner's challenge to
21 his 2007 denial of parole.

22 After carefully reviewing the record now before the court,
23 the court finds for essentially the same reasons stated in its order
24 granting petitioner habeas relief on his challenge to his 2006
25 parole denial that there was no evidence at the time of petitioner's
26 July 30, 2007 hearing that he was not suitable for parole and would
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1 pose an unreasonable risk of danger to society or a threat to public
2 safety if released from prison. The court further finds the state
3 court's determination that the "some evidence" standard was
4 satisfied by the evidence presented at the hearing was an
5 objectively unreasonable application of Superintendent v Hill, 472
6 US 445, 457 (1985).² See 28 USC § 2254(d). As a result, petitioner
7 is entitled to federal habeas relief on his due process claim.

8 Accordingly, the petition for writ of habeas corpus is
9 GRANTED. Within twenty days of the date of this order, BPH must
10 calculate a term for petitioner and set an imminent date for his
11 release in accordance with California Penal Code § 3041(a). Within
12 ten days of petitioner's release, respondent must file a notice with
13 the court confirming the date on which petitioner was released.

14 In the event respondent files a timely notice of appeal of
15 this order, in the interest of judicial economy, the court of
16 appeals may wish to consolidate this appeal with the appeal pending
17 in Sullivan v Ayers, No 09-17403 (9th Cir, filed Oct 28, 2009). See
18 FRAP 3(b)(2).

19
20 IT IS SO ORDERED.



21 VAUGHN R WALKER
22 United States District Chief Judge
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27 ² Even the state court "recognize[d] that [BPH's] reasoning
28 process was not completely flawless." Doc #6-5 at 89.